Nos. 79-1711; 79-1754; 79-1760; 80-12
(Consolidated)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

CITY OF NEW YORK AND ABRAHAM BEAME,

Petitioners (79-1760),

-v.-

NATIONAL SEA CLAMMERS ASSOCIATION
AND GOSTA LOVRGEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS CITY OF NEW YORK AND BEAME

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ARGUMENT

I. FEDERAL COMMON LAW IS NOT ANALOGOUS TO THE COMMON LAW APPLIED IN STATE COURTS, AS EACH HAS A DIFFERENT FUNCTION IN ITS RESPECTIVE LEGAL SYSTEM.

Federal petitioners argue that since a federal common law of nuisance exists for suits brought by a state, "there is no reason to deny to a private party the right to invoke that law" (Federal brief, p. 33) in the same manner that private parties alleging special injury may invoke state common law to abate public nuisances. The fallacy in this argument lies in the misconception of the nature of federal common law. As we set forth in our main brief, the "common law" used to adjudicate disputes between states is not analogous to the common law applied in state courts to adjudicate disputes between private parties. The former is a species of inter-

national law, while the latter is an expression of the general sovereignty of the states to order the primary relations of their residents.

Private parties are not permitted to assert the claims of their sovereigns in disputes between states for the reason that private parties do not represent the interests of their sovereigns; it is a legal fiction in state common law actions that the private plaintiff represents the sovereign. The non-sovereign interests of private parties is highlighted in the case at hand by the presence of New Jersey citizens as plaintiffs and defendants. The sovereign interests of the State of New Jersey encompass the interests of all her citizens, including the New Jersey defendants in this action. The State of New Jersey does not need the aid of private

parties or the federal courts to protect its sovereign interests from invasion by New Jersey sewerage authorities.

Federal petitioners rely on Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), for the proposition that a private party may invoke federal common law as a basis for a tort claim against a citizen of his own state or of another state when the tort occurs in interstate waters. Hinderlider stands only for the proposition that state law cannot grant private parties rights in interstate streams greater than the rights the state possesses itself under federal common law. While private parties may be bound by the precepts of federal common law, it does not follow from Hinderlider that private parties have standing to invoke it as the basis for a tort claim

under general federal question jurisdiction.

II. THE INTERSTATE NATURE OF OCEAN POLLUTION DOES NOT REQUIRE A UNIFORM FEDERAL COMMON LAW RULE TO ADJUDICATE DISPUTES HEARD IN FEDERAL COURT.

Neither the federal petitioners nor respondents have advanced any reason why a uniform federal common law should exist to govern behavior in cases involving interstate water pollution, but should not exist in other fields where interstate impacts are great, such as the common law duties of interstate rail carriers. Cf. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Indeed Congress has clearly expressed its intention, both in the savings clause of the FWPCA and in 33 U.S.C. 1370, not to require uniformity, but to allow staces to impose their own standards to accommodate peculiar local

conditions. The exceptions to the local option are narrow and specific.* In these circumstances, the need for a uniform body of federal tort law adverted to by federal petitioners does not seem compelling.

III. CONGRESSIONAL PREEMPTION OF FEDERAL COMMON LAW OUGHT TO BE MORE READILY FOUND THAN CONGRESSIONAL PREEMPTION OF STATE LAW. THERE IS NO REASON FOR FEDERAL COMMON LAW COURTS TO APPLY STANDARDS OF CONDUCT DIFFERENT FROM THE STANDARDS CONGRESS HAS DEEMED APPROPRIATE.

Federal petitioners rely on Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), to support their contention that federal common law has not been preempted (Federal Amicus Curiae Brief in Illinois v. City of Milwaukee, No. 79-408, p. 20). But the constitutional policy at issue in

*See City's initial brief, p. 4, note 3; see also 33 U.S.C. 1416 (d).

Nader and related cases is primarily one of federalism; the constitutional issue involving congressional preemption of federal common law in the case at hand is one of separation of powers. Congress has created a complex regulatory scheme to govern discharges of pollution into the national waters, a scheme which allows for a far broader array of factors to be taken into account -- and a far greater expertise to be applied -- than that employed by courts in common law actions. The following comments, addressed to private rights of action in administrative law, are equally applicable to the suggested invocation of federal common law in the case at hand: where private rights of action are exercised,

> court, plaintiff and defendant have bypassed the administrative process and are in another world

> entirely, where there is no trial and error, no rule making cutting across the closed system of particular "cases", no accommodation, strategic delay, monitoring of consequences, reversal of direction, and reconsideration of positions. Court, plaintiff and defendant are in a world of rights and duties, discrete cases, correct and incorrect answers, res judicata, and irreversible consequences.

Vining, Legal Identity, 108.

Courts need not be hesitant in finding congressional preemption of federal common law when comprehensive regulatory programs administered by expert administrative agencies have been created. The statutory pollution limitations -- whether expressed in terms of a particular technology or in terms of the state and federal water quality standards which must not be violated -- represent the extent of the federal interest. The courts should defer to the congressional judgment as to the extent of the federal

interests. There is no reason why a federal common law court should apply a standard of conduct different from the statutory and regulatory standards that Congress has deemed be applied. The review mechanism of the Administrative Procedure Act, not common law collateral attacks on agency decisions, is the appropriate method for federal judicial involvement in issues involving federally regulated activities.

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